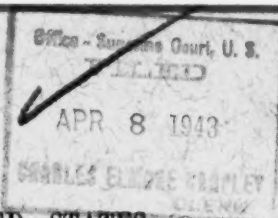


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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1942**

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**No. 899**

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**MARYLAND CASUALTY COMPANY, A CORPORATION,**  
*Petitioner,*

*vs.*

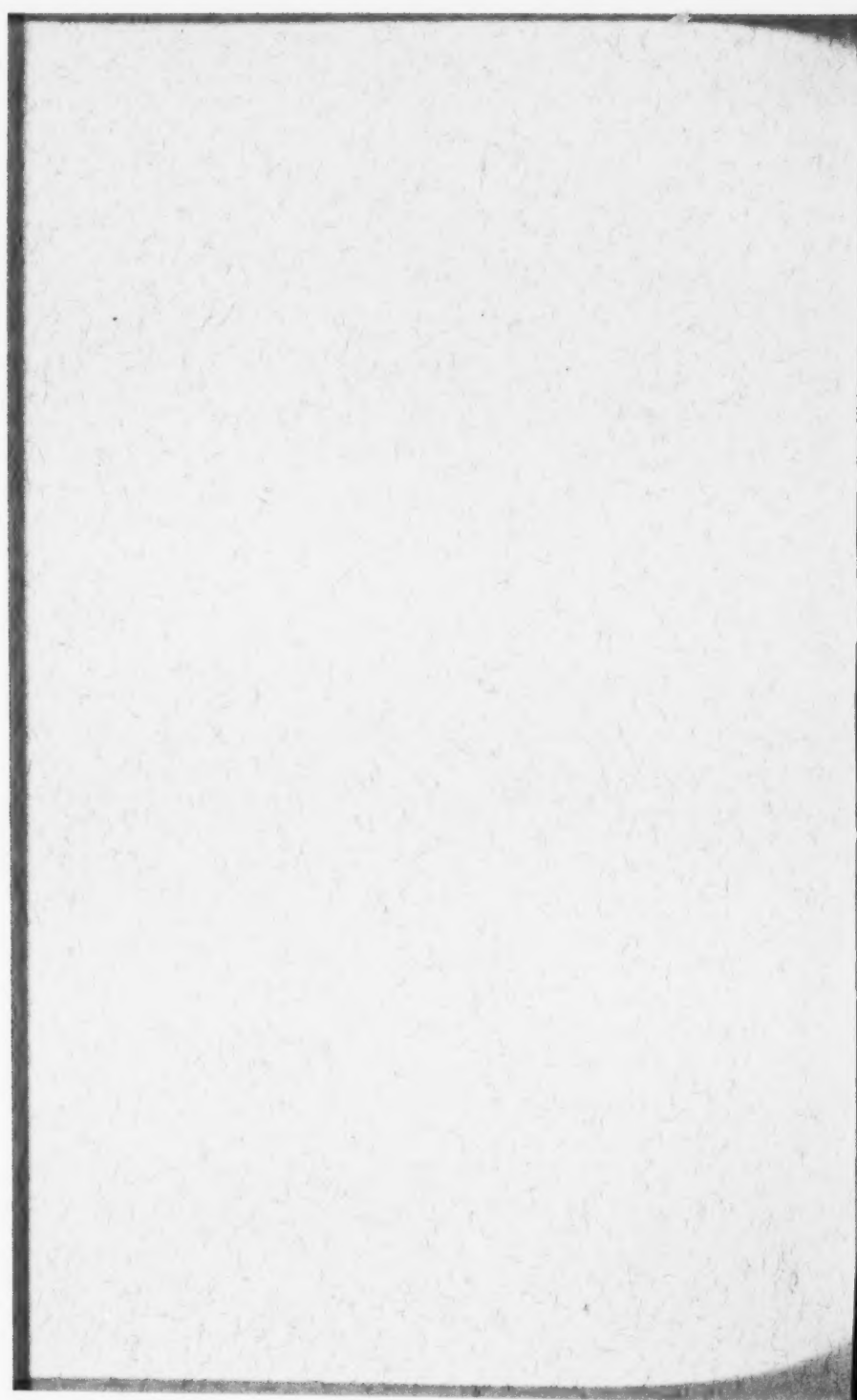
**DIXIE PINE PRODUCTS COMPANY, A CORPORATION.**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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**R. W. HEIDELBERG,**  
**M. M. ROBERTS,**  
*Counsel for Petitioner.*



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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No. 899

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MARYLAND CASUALTY COMPANY, A CORPORATION,  
*vs.* *Petitioner,*

DIXIE PINE PRODUCTS COMPANY, A CORPORATION.

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

---

The Maryland Casualty Company, a corporation, through attorneys prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above case:

I.

**Summary and Short Statement of the Matter Involved.**

A. HISTORY OF CASE.

This suit originated in the Circuit Court of Forrest County, Mississippi, and was removed to the District Court of the United States for the Hattiesburg Division of the Southern District of Mississippi on theory of diversity of

citizenship. A trial followed, resulting in judgment for petitioner, from which an appeal was prosecuted by respondent to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the trial court with directions for remand to District Court for further proceedings.

#### B. STATEMENT OF PLEADINGS.

Respondent's declaration or complaint was based upon accident policy dated June 25th, 1939, covering twenty-two unfired vessels and it is charged that one of the unfired vessels, a turpentine extractor, exploded on May 28th, 1941, causing damages to plaintiff's property in excess of \$130,000.00. The suit is for \$50,000.00, the amount of the policy (R. 3-5).

The policy of insurance is made exhibit to complaint and covers loss on property of assured "directly damaged" by an accident unless the loss results from fire or an accident caused by fire or from "any indirect result of an accident" (R. 6). The form policy of insurance identifies through schedule of unfired vessels the objects covered as twenty-two turpentine extractors (R. 14). The object, when an unfired vessel, is described to mean "the cylinder, tank, chest, heater plate, or other vessels so described" but excludes inlet and outlet pipes (R. 15).

Petitioner's answer admitted the existence of the insurance policy but denied that an explosion of an object covered occurred as per pleadings (R. 33-34), and asserted defenses that the loss complained of resulted from fire or an accident caused by fire or from an indirect result of an accident and that the accident, if any, involved an inlet or outlet pipe (R. 38).

#### C. SUMMARY OF EVIDENCE.

The insurance contract became a part of the evidence (R. 5-26). The evidence for respondent was furnished



through Honorable T. J. Wills, attorney for plaintiff, who was not present at the time of the accident; Mr. T. F. Dreyfus, President of the complaining corporation, who was not present at the time of the accident; Mr. H. L. McLain, who sought to qualify as an expert and who never saw the plant until it was rebuilt and at a time when the case was about to be called for trial; Mr. R. G. Wooten, Accountant, familiar with the records of the complaining corporation but not a witness to the accident; Mr. Shelby Pickett, insurance agent, who was not a witness to the accident; and R. L. McGregor, W. E. Estes and W. M. Wilson, who were used only to show that there was an explosion at the plant of respondent on May 28th, 1941. In spite of the fact that the plaintiff had available eye witnesses to the accident, none were used. The testimony justified the conclusion which is supported by the physical facts that there was a two inch copper pipe leading from a T-joint and beginning some eighteen inches from the top of turpentine extractor Number 14 of the objects covered, to a header and from thence to a condenser and which pipe ruptured about six inches from the T-joint and about twenty-four inches from the extractor proper resulting in losses of an explosive fluid or gas which came in contact with a fire in an adjoining boiler room about thirty minutes later resulting in an explosion.

Witness Wills recognized that the pipe of which Exhibit 7 to the testimony was a part was an outlet pipe through which flowed the solvent solution running from the extractor to the header (R. 90).

Witness Dreyfus for respondent testified that the two inch copper pipe which ruptured ran a distance of twenty-five to thirty feet before it reached the header and from there it led to a condenser (R. 118-119).

Witness McLain did not see the plant until ten months after the fire, but he was familiar with extractors used to

salvage valuable substances from pine stumps and he testified that the solvent fluid at the time of the accident was in gaseous form, heavier than air (R. 161).

Witness R. G. Wooten dealt only with monetary values.

It was petitioner that furnished the remainder of the evidence covering the first and only positive testimony as to how the accident occurred. John S. Huey, representative of Fire Companies Adjustment Bureau, adjusted the fire loss. He testified that the explosion was not of the extractors but of the explosive vapors in the building (R. 259).

Witness J. M. Todd for petitioner testified that the damage was to the outside of the extractors and showed no explosion or force from within (R. 289).

Petitioner furnished T. F. Williams and Kay Hinton, employee witnesses, and Albert White, former employee, who were eye witnesses and had personal knowledge of what occurred. They all testified that some twenty-five or thirty minutes passed after the rupture of the outlet pipe leading from the extractor to the header before there was an explosion and they explained the method used by spraying water to stop the flow of the substance in gaseous form before it finally reached the boiler room and boiler fire (R. 304 and 308-309).

Witness White for petitioner was foreman in charge at the time of the accident. He expected the gaseous vapor to catch on fire (R. 311). He knew that the pipe which ruptured was moving gas from extractor through header to condenser at time of accident, thereby making it an outlet pipe (R. 320).

#### D. PROCEEDINGS AT TRIAL.

After all testimony had been presented to the court, motion of petitioner for directed verdict was sustained. In sustaining said motion, the trial judge said, "Gentlemen

of the Jury, there is no conflict in the testimony in this case, as I see it, and it becomes a question of law, and I have reached the conclusion that the defendant is entitled to a directed verdict, because this loss was not covered by the policy." (R. 327.)

#### E. PROCEEDINGS IN DISTRICT COURT AFTER JUDGMENT.

Respondent filed no motion of any kind in the trial court after judgment was entered. Notice of appeal and bond were filed on July 10th, 1942 (R. 335-336). On July 13th and just three days after the Notice of Appeal had been filed the trial Judge entered an order extending time for filing the record on Appeal to ninety days from the notice of appeal; and on October 8th, 1942, the court ordered that all original exhibits in the cause be sent up with the record (R. 337). There was not filed by respondent with the District Court a designation of the contents of the record and evidence to be contained in the record on appeal.

#### F. PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS.

There was filed by petitioner as appellee in Circuit Court of Appeals, a motion to dismiss the appeal (R. 339). The basis for the motion was that the record on appeal was not filed within forty days or within ninety days under extended time as required by District Court Rule Number 73 (g), and Rule 16 of Circuit Court of Appeals; and that appellant failed to comply with Rule 75 (a) in that it did not serve upon appellee and file with the District Court a designation of the contents of the record and evidence to be contained in the record on appeal. The opinion made no reference to this motion. The opinion proper of the Circuit Court of Appeals was written by Circuit Judge Holmes and Circuit Judge Sibley wrote a concurring opinion but the opinions are on conflicting theories and legal applications (R.

341-345). Judgment was entered thereon (R. 345). Petition for rehearing was filed for respondent and which was denied (R. 347-351). In denying petition for rehearing the court held that the record on appeal from a District Court to a Circuit Court of Appeals does not have to be filed within ninety days as said Rule 73 (g) requires, and that the testimony for the plaintiff was sufficient to create a question of fact against petitioner which should have been submitted to a jury, thereby holding in effect that the testimony of respondent met the burden cast upon it.

(1) *The principal opinion written by Circuit Judge Holmes erroneously held:*

That policy defined the object "with respect to unfired vessels to mean the complete group of such vessels including interconnecting pipes," when as a matter of fact the definition referred to in the policy involved "a described machine" and not an "unfired vessel" (R. 15). There was no dispute in the testimony and no facts to be decided by the jury, but the court held that "whether this was an interconnecting or an outlet pipe was a question of fact concerning which the evidence conflicted" (R. 343). The court held that "the accident was the rupture of the pipe; it was caused by pressure, not by fire" (R. 343). The court further held that the assured's loss resulted directly from the rupture of the pipe even though the pipe was ruptured for approximately thirty minutes before a fire in the boiler house ignited the fumes and started the explosion; and the court further held that the fire in the boiler was a friendly fire and that the exclusion under the policy had no application (R. 344).

(2) The concurring opinion of Circuit Judge Sibley reached the same result but with different reasoning and an apparent inability to follow the principal opinion. The

Circuit Judge in his concurring opinion pointed out that in the twenty-five or thirty minutes the fire in the boiler house could have been extinguished. It was further pointed out that a pump was wrecked from internal pressure and that the pleadings are not clear but that the proof supports reasonable issue as to whether or not the injured extractors were damaged by over pressure from pump or steam heat or both rather than by the external explosion and the court concludes that the wrecked pump sufficiently contradicts the employee who turned off the pump to make an issue for the jury.

(3) The petition for rehearing was denied without written opinion and the court thereby failed to recognize the exclusions under the policy, (a) that the accident complained of resulted from loss from fire, (b) that the rupture of the pipe as an inlet or outlet pipe was excluded under the terms of the policy because pipes are not a part of the unfired vessels covered and, (c) that the twenty-two turpentine extractors are not described machines but are twenty-two separate extractors and that pipes in connection therewith are not parts of the objects under the definition. Closely related to this general statement are the principles in the petition for rehearing that the facts were not in dispute and it became a question of law and not of fact for determination by the court and not by the jury under the terms of the policy; and further the court on petition for rehearing again ignored the motion to dismiss the appeal.

It is submitted by petitioner that these holdings of the Circuit Court of Appeals were in contradiction of its rights under said Rules of Civil Procedure and violated the Fifth Amendment of the Federal Constitution in that petitioner has been denied due process of law.

## II.

**Jurisdiction.**

A final judgment was entered in the United States District Court for the Hattiesburg Division of the Southern District of Mississippi on April 17th, 1942 (R. 335). The opinion of the Circuit Court of Appeals reversing the trial court was entered on February 6th, 1943 (R. 341). The jurisdiction of this court is invoked under the Act of February 13th, 1925, being Title 28, U. S. C. A., Section 347, page 359. There are involved questions of general importance with no uniformity of decision in Circuit Courts of Appeal and applicability of "Rules of District Courts" promulgated by the Supreme Court of the United States and particularly Rule 73 (g) and Rule 75 (a).

## III.

**Questions Presented.**

The questions presented are as follows:

A. Whether the Circuit Court of Appeals violated the general rules of construction as to contracts to involve private and public interests and thereby create a novel and important question of peculiar gravity, and in conflict with applicable local decisions, causing a different standard of proof from that heretofore prevailing.

B. Whether the opinion of Circuit Court of Appeals is in conflict with other like courts in other circuits.

C. Whether the Circuit Court of Appeals has through opinion rendered violated the Fifth Amendment to the Federal Constitution depriving petitioner of due process of law by making a strained and uncommon construction of the contract of insurance involved and the rules of law applicable thereto.

D. Whether the Circuit Court of Appeals could under the present existing law ignore an unanswered and uncontested motion to dismiss based upon Rules 73 (g) and 75 (a) of the Civil District Courts promulgated by the Supreme Court of the United States or whether the said motion appearing confessed and unexplained should have been sustained.

#### IV.

##### **Reasons Relied On for the Allowance of the Writ.**

A. The Court has right to sustain the trial court without another trial as would be required if the judgment of the Circuit Court of Appeals should prevail.

B. The Circuit Court of Appeals violated the general rules of construction as to contracts under state of pleadings and with no uniformity of conclusions within itself.

(1) The Circuit Court of Appeals ignored or improperly applied the exclusion of loss from fire.

(2) Said court ignored or improperly applied the exclusion of loss from an accident caused by fire.

(3) Said court ignored the exclusion of loss from any indirect result of an accident.

(4) Said Court improperly applied definition of a machine under the terms of the policy to the unfired vessels covered.

(5) Said court erroneously interpreted the insurance contract to cause unfired vessels to include the pipe which ruptured.

(6) Said court in the principal opinion reversed the trial court on one theory, but with an entirely different view expressed by the Circuit Judge writing the concurring opinion and in such manner as to create and cause confusion if the cause goes back to the trial court as directed.

C. The opinion of the Circuit Court of Appeals is in conflict with other like courts in other circuits, in addition to being in conflict with the concurring opinion.

D. The Circuit Court of Appeals has violated the Fifth Amendment to the Federal Constitution and deprived your petitioner of due process.

E. The Circuit Court of Appeals has ignored an unanswered and uncontested motion to dismiss the appeal of respondent from trial court and which motion is based upon violations of Rules 73 (g) and 75 (a) of Rules of Civil Procedure for District Courts promulgated by the Supreme Court of the United States, and which motion should have been sustained and the appeal dismissed.

V.

**Prayer for Writ.**

Wherefore, it is respectfully submitted that this petition should be sustained and writ of certiorari issued as required by law.

MARYLAND CASUALTY COMPANY,  
A Corporation,  
*Petitioner.*

By R. W. HEIDELBERG,  
M. M. ROBERTS,  
*Attorneys for Petitioner,*  
*Hattiesburg, Mississippi.*



